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In The

Supreme Court of the United States

October Term, 1974

No. 74-1620

BRENDAN SULLIVAN,

Petitioner

-vs.-

DEPARTMENT OF SOCIAL SERVICES OF
THE CITY OF NEW YORK,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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INDEX

PAGE

Opinions Below 1

Jurisdiction 2

Questions Presented. 2

Statement Of The Case 4

REASONS FOR GRANTING THE WRIT
Important issues involving an individual's right to be heard prior to being terminated from public employment as required by the Fourteenth Amendment to the Constitution are raised by the instant writ 8

Conclusion 14

Appendices A1

AUTHORITIES CITED

TABLE OF CITATIONS

PAGE

Cases:

Armstrong v. *Manzo*, 380 U.S. 545, 552 (1965) 9
Arnett v. *Kennedy*, 413 U.S. 134 (1974) 13
Balash v. *N.Y.C. Employee's Retirement System*, 34 N.Y. 2nd 654 (1974) 9
Bell v. *Burson*, 402 U.S. 535 (1971) 9
Boddie v. *Connecticut*, 401 U.S. 371 (1971) 9
Fuentes v. *Shevin*, 407 U.S. 67, 82 (1972) 9
Goldberg v. *Kelly*, 397 U.S. 254 (1970) 9
Greene v. *McElroy*, 360 U.S. 474, 496 (1959) 10
Ohio Bell Telephone Co. v. *Public Utilities Commission of Ohio*, 301 U.S. 292 (1937) 9, 11
Perry v. *Sindermann*, 408 U.S. 593, 603 (1972) 9
Regents v. *Roth*, 408 U.S. 564 (1972) 9
Schroeder v. *City of New York*, 371 U.S. 208 (1962) 10
Slochower v. *Board of Education*, 350 U.S. 551 (1956) 9
Wieman v. *Updegraff*, 344 U.S. 183 (1952) 9
Willner v. *Committee on Character and Fitness*, 373 U.S. 96 (1963) 10
Wisconsin v. *Constantineau*, 400 U.S. 433 (1971) 9

CONSTITUTIONAL PROVISION:

United States Constitution
Fourteenth Amendment

STATUTES AND RULES

New York Civil Service Law § 75

New York City Civil Service Commission Rules and Regulations, Rule 6.4.6.

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BRENDAN SULLIVAN,

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DEPARTMENT OF SOCIAL SERVICES OF THE CITY OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petitioner, Brendan Sullivan (herein Sullivan, or the petitioner) respectfully prays that a Writ of Certiorari issue to review the judgment of the Court of Appeals of the State of New York entered in this proceeding on March 24, 1975 (App. pp. A-13–A14).

OPINIONS BELOW

The opinion of the Court of Appeals of the State of New York, not yet reported, appears in the appendix hereto. (App. pp. A-13–A-14). No opinion was rendered by the Appellate Division of the New York State Supreme Court. A copy of the Order of said Court appears in the Appendix at pp. A-10-A11. The opinion of the New York State Supreme Court, the trial court, was issued on June 5, 1973 (App. pp. A-9).

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JURISDICTION

The opinion and judgment of the Court of Appeals of the State of New York was issued on March 24, 1975 and this petition for certiorari was filed within ninety (90) days of that date. The jurisdiction of this court is invoked under 28 U.S.C. Section 1257 (3).

QUESTIONS PRESENTED

1. Was petitioner denied the due process of law guaranteed under the XIV amendment to United States Constitution when he was terminated from his position with the New York City Department of Social Services without any hearing and without an opportunity to defend the charges made against him?

2. Did the "hearing" accorded the petitioner some 13 months after he was denied his Civil Service position remedy the previous denials of the due process standards of the XIV amendment to the United States Constitution when the "hearing" was conducted at a time when the petitioner was still not restored to the status denied him in an unconstitutional manner and was conducted by a body which had no jurisdiction over him and which "tried" him on charges unrelated to the previous allegations made against him?

Constitutional Provisions and Statutes Involved

United States Constitution Amendment XIV:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

New York Civil Service Law §75:

§75. REMOVAL AND OTHER DISCIPLINARY ACTION

1. Removal and other disciplinary action. A person described in paragraph (a), or paragraph (b), or paragraph (c), or paragraph (d) of this subdivision shall not be removed or otherwise subjected to any disciplinary penalty provided in this section except for incompetency or misconduct shown after a hearing upon stated charges pursuant to this section.

(a) A person holding a position by permanent appointment in the competitive class of the classified civil service, or ...

2. Procedure. A person against whom removal or other disciplinary action is proposed shall have written notice thereof and of the reasons therefor, shall be furnished a copy of the charges preferred against him and shall be allowed at least eight days for answering the same in writing. The hearing upon such charges shall be held by the officer or body having the power to remove the person against whom such charges are preferred, or by a deputy or other person designated by such officer or body in writing for that purpose. In case a deputy or other person is so designated, he shall, for the purpose of such hearing, be vested with all the powers of such officer or body and shall make a record of such hearing which shall, with his recommendations, be referred to such office or body for review and decision. The person or persons holding such hearing shall, upon the request of the person against whom charges are preferred, permit him to be represented by counsel, and shall allow him to summon witnesses in his behalf. The burden of proving incompetency or misconduct shall be upon the person alleging the same. Compliance with technical rules of evidence shall not be required.

3. Suspension pending determination of charges; penalties. Pending the hearing and determination of charges of incompetency or misconduct, the officer or employee against whom such charges have been preferred may be suspended without pay for a period not exceeding thirty days. If such officer or employee is found guilty of the charges, the penalty or punishment may consist of a reprimand, a fine not to exceed one hundred dollars to be deducted from the salary or wages of such officer or employee, suspension without pay for a period not exceeding two months, demotion in grade and title, or dismissal from the service; provided, however, that the time during which an officer or employee is suspended without pay may be considered as part of the penalty....

New York City Civil Service Commission Rules and Regulations Rule 6.4.6.

When an employee absents himself without leave and fails to communicate with his department in the manner prescribed by his department for a period of twenty consecutive work days, such absence shall be deemed to constitute a resignation effective on the date of its commencement unless the appointing officer, in his discretion, sees fit to accept an explanation for such unauthorized absence.

STATEMENT OF THE CASE

This case presents a significant question involving the application of the Due Process Clause of the 14th Amendment of the United States Constitution to the procedures followed by the City of New York when removing permanent Civil Service employees from their positions. While the instant case involves the trial and tribulations of only one individual its effect directly relates to the Constitutional rights of literally hundreds of thousands of employees who are subject to the Civil Service Rules of the City of New York.

Petitioner, Brendan Sullivan, was employed by the Department of Social Services on February 7, 1966 in the title of caseworker in the Competitive Classified Civil Service of the City of New York. He continued in that capacity until his employment was terminated by the respondent as hereinafter described.

From February 7, 1966 until October 26, 1971, a period of more than five years, Mr. Sullivan was assigned to the Veteran's Assistance Social Service Center Office where he successfully performed his duties. Mr. Sullivan's work was considered good, and his supervisor had no complaints about its quality.

On October 26, 1971 Mr. Sullivan was stricken with a severe attack of colitis, blepharitis and nervosa anorexia, incapacitating illnesses which caused the Petitioner to suffer diarrhea, nausea, nervous tremors and loss of weight. At the time, Mr. Sullivan was sixty years of age.

On the very day he was stricken, he telephoned a co-worker in his office, informed him of the nature of his illness, and requested that he communicate with the supervisor. On three separate occasions between October 26 and November 15, 1971, he telephoned Mrs. D. L. Omansky in the Office of the Division

of Personnel Relations of the Department of Social Services of the City of New York, informed her of his incapacity, and requested medical leave, in accordance with standard departmental procedure. On November 15, 1971, 19 days after the onset of Mr. Sullivan's illness, Mr. Sullivan called his supervisor, Louis G. Gaspari, and the director of the Veteran's Assistance Center, Edward J. Marchasi, explained his medical incapacity, and requested a medical leave of absence.

On December 23, 1971, less than two months after the onset of Mr. Sullivan's illness, Ralph Lichtenstein, Acting Director of respondent's Bureau of Personnel Administration, wrote a letter to Mr. Sullivan stating that, because Mr. Sullivan allegedly failed to keep an appointment with one of the respondent's medical officers on November 1, 1971, and because Mr. Sullivan had not yet submitted a medical report which he promised on November 22, 1971, Mr. Sullivan's absence since November 23, 1971 was deemed a "resignation" pursuant to New York City Civil Service Commission Rule 6.4.6. *This letter was never delivered to Mr. Sullivan.*

Since Mr. Sullivan did not receive the letter he could not explain that he was too ill to keep the appointment on November 1st, or that the medical statement (which was subsequently submitted) was being delayed pending the completion of medical tests. Most importantly, however, Mr. Sullivan received no notice of this alleged "resignation," or the arbitrarily selected date thereof.

On March 14, 1972, having recovered his health, Mr. Sullivan applied for reinstatement. His application was denied by letter dated March 23, 1972.

At no time did Mr. Sullivan intend to resign or abandon his employment. However, his repeated attempts to be heard with respect to the reasons for his absence and to present supportive evidence that he had in fact informed the Agency of his condition were rebuffed.

Despite his incapacitated condition, Mr. Sullivan continually notified his department of his intention to return to work. Ample notification was given, both during and after the twenty day period prescribed in Rule 6.4.6., and Mr. Sullivan has maintained these proceedings in a continued effort to seek reinstatement and damages for the loss of earnings and stigma he has suffered due to respondent's strict enforcement of Section 6.4.6 and its absolute refusal to hear his position.

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6. Mr. Sullivan has received no salary or compensation from the respondent whatsoever for any period subsequent to October 29, 1971. Mr. Sullivan is now fully capable of returning to his employment and performing his duties. Indeed, Mr. Sullivan, as a man in his 60's and a professional social services worker with no independent means of support, has no alternative but to continue to press for the return of his position.

A fair hearing and opportunity to be heard on the issue of whether he abandoned his employment was the first step toward this goal. Respondent, relying on Section 6.4.6 refused to take this step in what was an apparent attempt to "starve" Petitioner out.

On or about April 28, 1972, Mr. Sullivan commenced a proceeding pursuant to Art. 78, N.Y.C.P.L.R. seeking to review respondent's arbitrary determination resulting in the termination of his employment, without notice or an opportunity to be heard.

In his petition, Mr. Sullivan observed that he never intended to resign his employment, and had given full and timely notice of his illness to the respondent. He contended,

> "that the failure of the Department of Social Services to reinstate petitioner to his job as of the date upon which he was certified able to return by competent medical authority is a violation of the Rules of the Civil Service Commission [and] a deprivation of petitioner's right of due process and of equal protection under law."

Mr. Sullivan noted that:

> "Petitioner was not served with written specific charges nor given a reasonable time to prepare any defense nor afforded a full and fair hearing, nor any hearing at all for that matter."

The Article 78 proceeding culminated in the decision of Justice Frank of the New York Supreme Court (App. Pp. A-4–A-6). Justice Frank concluded, in effect, that Mr. Sullivan had not been discharged pursuant to Rule 6.4.6, but that he had been discharged for alleged "misconduct," thereby avoiding the Constitutional issue and for the first time adding the wholly extraneous issue of "misconduct." Justice Frank ordered the respondent to convene a hearing pursuant to Section 75 of the Civil Service Law of New York.

At the time Petitioner had not been reinstated and, therefore, was not a person subject to "removal" under that statutory provision.

Petitioner demanded to be reinstated to his position, or receive his back pay, prior to the hearing. Respondent adamantly refused to do so. Instead, under threat of default judgment respondent served charges and specifications which included substantial allegations which were in no way related to the cause for his original discharge. The charges were framed in a vituperative manner apparently to assure his continued absence from City payrolls. He had now apparently raised substantial "due process" issues which struck at the heart of employer control and his continued presence would constitute a thorn in the side of respondent. Mr. Sullivan's case which had begun as a simple exercise of arbitrary power due to alleged absence had become a cause celebre and he had to be crushed.

The "charges" were served on April 28, 1973, thirteen months after Mr. Sullivan was certified as capable of returning to work.

Mr. Sullivan's counsel objected to the scope of the charges, in that they raised issues which were irrelevant to the Article 78 proceeding which resulted in the judgment directing a hearing. He asserted that the sole issue was whether Petitioner had abandoned his position pursuant to Section 6.4.6. and that no extraneous issues could be raised. Moreover, he asserted that since Mr. Sullivan had not been restored to his position prior to the convocation of the "Hearing," no Section 75 Hearing could take place because such hearings only had jurisdiction over permanent civil servants, and, until the matter of his alleged abandonment was resolved by a hearing and reinstatement, Mr. Sullivan could not be considered a permanent civil servant.

Respondent again acting in its cavalier manner, conducted a "hearing" in the absence of Mr. Sullivan's attorney. Evidence was introduced which was utterly unrelated to Mr. Sullivan's alleged "resignation" of November 23, 1971. It appears that the evidence differed in material respects from the specifications served on Mr. Sullivan. Nevertheless, by letter dated August 7, 1973, Mr. Sullivan's "dismissal" as caseworker, originally based on an alleged absence for more than twenty days without notification, but now based on alleged misconduct, was confirmed.

Mr. Sullivan promptly moved to make the determination of Justice Frank dated April 10, 1973, the final judgment in this matter. As stated in the moving affirmation of Mr. Sullivan's attorney:

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"The United States and New York State Constitutions with their guarantees of due process and fair and equal treatment under law have become but illusory shields to this beleaguered petitioner."

Mr. Sullivan's motion was denied by Mr. Justice Gellinoff of the New York Supreme Court on June 5, 1973 and judgment was entered accordingly (App. p. A-9). By order entered on April 22, 1974, the Appellate Division, First Department, New York State Supreme Court, affirmed without opinion (App. p.A-12) and, on March 24, 1974, the New York State Court of Appeals affirmed on the grounds that Petitioner had, in fact, not been denied "due process" because he was ultimately given a "hearing." (App. p. A-13–A-14).

Petitioner, has throughout the proceedings, asserted that the procedures followed with respect to his termination denied him due process of law as guaranteed by the XIV Amendment to the Constitution. In his initial petition to the New York State Supreme Court in April, 1972, Mr. Sullivan noted that the procedures being followed denied him the due process of law guaranteed by the United States Constitution (App. pp. A-1–A-2) and asserted it again when he sought reinstatement and initiated the instant action in the New York State Supreme Court. (App. pp. A-7-A-8). Counsel for Petitioner continued to assert the constitutional issue in both the Appellate Division of the New York Supreme Court and before the New York Court of Appeals.

REASONS FOR GRANTING THE WRIT

IMPORTANT ISSUES INVOLVING AN INDIVIDUAL'S RIGHTS TO BE HEARD PRIOR TO BEING TERMINATED FROM PUBLIC EMPLOYMENT AS REQUIRED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION ARE RAISED IN THE INSTANT WRIT.

Section 6.4.6 of the New York City Civil Service Commission Rules and Regulations places New York City Civil Servants in a position wherein they may lose their means of making a livelihood without being accorded a hearing or the most elementary aspects of due process of law as guaranteed in the XIV amendment to the Constitution. It is clear that the Section

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both on its face, and in the manner in which it was applied, denies petitioner due process of law.

This Court has held, on numerous occasions, that, as a permanent appointee in the competitive classified civil service, an individual has a property right in his employment, and, such right may not be denied him absent according the individual the elementary rights required by the due process clause of the XIV amendment to the Constitution. *Regents* v. *Roth*, 408 U.S. 564 (1972); *Perry* v. *Sindermann*, 408 U.S. 593, 603 (1972); *Slochower* v. *Board of Education*, 350 U.S. 551 (1956); *Wieman* v. *Updegraff*, 344 U.S. 183 (1952).See also *Balash* v. *N.Y.C. Employee's Retirement System*, 34 N.Y. 2d 654 (1974). The "...constitutional protection...extend(s) to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory." *Wieman* v. *Updegraff*, 343 U.S. 183, 192.

Once it is established that a person has a property right in his civil service position it becomes apparent that the individual in question is entitled to a hearing. "When protected interests are implicated, the right to some kind of prior hearing is paramount." *Regents* v. *Roth supra*, at 569. See also *Fuentes* v. *Shevin*, 407 U.S. 67, 82 (1972); *Bell* v. *Burson*, 402 U.S. 535 (1971); *Boddie* v. *Connecticut*, 401 U.S. 371, (1971); *Wisconsin* v. *Constantineau*, 400 U.S. 433 (1971); *Goldberg* v. *Kelly*, 397 U.S. 254 (1970). It is the only manner in which an individual can be protected against the arbitrary actions of the State. *Ohio Bell Telephone Co.* v. *Public Utilities Commission of Ohio*, 301 U.S. 292 (1937).

A hearing must take place, except in cases involving an unusual emergency, prior to the action which deprives the individual of a property right to meet the standards of due process. *Regents* v. *Roth supra, Bell* v. *Burson, supra* at 542.

The XIV Amendment requires that the hearing be held "at a meaningful time and in a meaningful manner." *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965). And, where, as in the instant matter, the individual who seeks the hearing lacks independent resources, the necessity for a pre-termination hearing becomes essential. For, absent a pre-termination hearing, his need to concentrate on staying alive may in fact serve to deprive him of the ability to seek post-termination redress from a recalcitrant bureaucracy. See *Goldberg* v. *Kelly* supra at 262.

Moreover, only through the device of a fair hearing convened prior to the termination can petitioner avoid the stigma which

attaches thereto. An individual, under our constitutional system, has a basic right to forestall the "unsavory label" which may be publicly applied to him through bureaucratic caprice. See *Wisconsin* v. *Constantineau, supra* at 437. To provide a post-termination hearing is to attempt to remove a stigma which petitioner had no need to suffer. It is an attempt to provide half a loaf when an individual is entitled to the whole.

These propositions have been enunciated on numerous occasions. Thus, in *Willner* v. *Committee on Character and Fitness*, 373 U.S. 96, (1963), this court held that an applicant for admission to the New York State Bar was entitled to an opportunity to be heard to contest the basis of the charges against him before being denied admission to the bar; in *Schroeder* v. *City of New York*, 371 U.S. 208 (1962), this court held that due process required that an owner of property be given adequate notice and an opportunity to be heard *before* the City of New York could divert water from her property. See also Davis, 1 *Administrative Law Treatise*, section 7.02 at 412 (1958).

It is a basic tenant of our constitutional system that "...where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the governments case must be disclosed to the individual so that he has an opportunity to show that it is untrue." *Greene* v. *McElroy*, 360 U.S. 474, 496, (1959).

Thus it is clear that a civil service employee has certain minimal rights to his position which cannot be denied absent a substantive hearing. Such a hearing must be held prior to his removal. Section 6.4.6 of the New York City Civil Service Commission Rules and Regulations contains none of the procedural safeguards mandated by the Constitution. The Rule states:

> "When an employee absents himself without leave and fails to communicate with his department in the manner prescribed by his department for a period of twenty consecutive work days, such absence shall be deemed to constitute a resignation effective on the date of its commencement unless the appointing officer, in his discretion, sees fit to accept an explanation for such unauthorized absence."

Thus, on its face, the rule is constitutionally invalid because it provides no form of prior hearing. Under Section 6.4.6, contrary to this court's decision in *Greene* v. *McElroy; supra*, an

evidentiary conclusion is arrived at under circumstances wherein a person is being denied certain rights based on fact findings which have not been disclosed to the individual and which he has not had an opportunity to show are untrue. Due process does not permit such a "star chamber" proceeding. See *Ohio Bell Telephone Co.* v. *Public Utilities Commission of Ohio, supra.*

The Rule in question becomes even more offensive when it is viewed in light of New York Civil Service Law section 75 which creates an opportunity for a hearing for certain civil servants *prior* to discharge. Thus, in the City of New York there are two classes of permanent civil servants – those entitled to full procedural protection and those who are liable to summary removal. The distinction is not supported by any valid state interest, and results in a constitutionally invidious discrimination against a class of employees who are removed pursuant to Rules 6.4.6. Moreover it should be noted, under section 75, the burden of proving this conduct is on the person alleging the misconduct; while under Rule 6.4.6 an employee is "deemed" to have "resigned" – and thus the burden is on the employee to "satisfy" the appointing officer with an explanation. And, the employee faced with this enormous burden, is not presented with *any* opportunity to be heard.

Thus it is clear that Rule 6.4.6, is both unconstitutional on its face and in the manner in which it is enforced. This is so because the constitution requires that an employee be given the *opportunity* to participate in a hearing *before* his position is declared vacant. In the case at bar the petitioner was required to seek a remedy in the courts merely to have an opportunity to have his version of the occurrence heard and to hear the nature of the charges against him.

When he finally accomplished his goal he found himself placed in the position where, apparently because he had protested the unconstitutional activities of the City of New York, he was brought before a hearing panel which was convened, not to determine whether he had voluntarily abandoned his employment, but to determine other acts of misconduct which he had allegedly engaged in and which, prior to the institution of his proceeding in the New York State Supreme Court seeking the hearing guaranteed to him by the Due Process Clause of the XIV Amendment, he had never before been made aware of.

Respondent, in attempting to avoid the consequences of the

basic requirements of the XIV amendment of the Constitution, and in an attempt to avoid the direct attack which was obviously to be forthcoming against Rule 6.4.6, conducted a "hearing" pursuant to Civil Service Rule 75 some 13 months after terminating the petitioner. The hearing came at the direction of a justice of the New York State Supreme Court. Again, however, respondents were so intent on supporting their initial determination, that they conducted the hearings in a manner which itself continued and enforced the prior unconstitutional actions.

After being directed to hold the hearing, respondents created a procedure whereby petitioner would be "tried" pursuant to section 75 of the New York Civil Service Law. However, they refused to reinstate petitioner prior to the time that the hearing took place. Moreover, they leveled new and irrelevant charges against him in a transparent attempt to punish him further for asserting his constitutional privileges.

Section 75, on its face, provides that "A person holding a position by permanent appointment in the competitive class of the classified civil service" is subject to the jurisdiction of a panel created under Civil Service Law Section 75. Any individual subject to proceedings pursuant to Section 75 may not be suspended, without pay, for a period of more than 30 days.

In the instant proceeding, petitioner was terminated and had not received pay for over one year. Therefore, respondent was attempting to enforce a part of the statute (the hearing provision) and ignore the balance thereof (the thirty day limit on suspension).

What respondent was attempting to do was to avoid the dictates of due process not to comply with them. Its purpose was to go through a hollow hearing by using a statute which, for their own convenience, they had emasculated so that they might assert jurisdiction over petitioner and confirm their prior desire to discharge him.

In this regard, it should be particularly noted that while petitioner was originally discharged under Rule 6.4.6 *only* for failure to report to work during a specified period of time, when he was charged under the truncated aspects of Section 75 he was charged with numerous employment violations separate and apart from his failure to report. In fact, the decision to confirm

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the prior ruling supporting the discharge was based not on his failure to report but on alleged acts of misconduct.

It is submitted that due process will not permit a governmental body to deprive an individual of a property right unless they have jurisdiction to make a decision with respect to his property right. In this case, since the petitioner had not been reinstated and had not been given his back pay, Section 75 of the New York Civil Service Law could not be applied. Petitioner was not a person holding a position of permanent employment in the competitive class of the classified civil service. Moreover, it could not be invoked because the petitioner had been suspended for in excess of 30 days without receiving any pay. Since the body in question had no jurisdiction to make a determination with respect to alleged misconduct that had taken place prior to petitioner's discharge, this body could not take away petitioner's property right. He had neither agreed, nor had the Respondent insisted, on any limitation on his right of employment nor had he agreed to accede to the jurisdiction of a Section 75 hearing in the circumstances under which it was convened. See *Arnett* v. *Kennedy*, 413 U.S. 134 (1974).

It was only through the improper assertion of jurisdiction over the petitioner that respondent attempted to avoid the direct and clear violations of the due process clause. When one dismisses the improperly invoked hearing, one is faced with the application of Rule 6.4.6 again. For, it was pursuant to Rule 6.4.6 that Mr. Sullivan was discharged. Under this rule, he was never accorded the right to a hearing during the course of which he could remove the stigma of discharge from his name and protect his rights. The sham that followed was merely a fiction created to give the trappings of due process without the substance.

One cannot use a fiction to avoid the requirements of the constitution.

It is for the above reasons that petitioner begs this court to accept the Writ of Certiorari. As previously noted, several hundred thousand employees of the City of New York, stand subject to loss of their property rights through the imposition of a rule which denies the elementary right to a hearing. Petitioner, standing alone, has fought for the right to be heard as to whether or not he in fact violated this rule. He has fought for the rights of every employee subjected to this tyranny. Only through this Court's intervention can these basic rights be preserved.

CONCLUSION

For the foregoing reasons, Brendan Sullivan, petitioner herein, respectfully prays that this petition for a Writ of Certiorari be granted.

June 18, 1975

Respectfully submitted,

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